LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 75-1485

RICHARD A. ASH, on behalf of himself and on behalf of BETHLEHEM STEEL CORPORATION,

Petitioner,

v.

CROWDUS BAKER, BERNARD D. BROEKER, STEWART S. CORT, LEWIS W. FOY, CHARLES W. GANZEL, THOMAS S. GATES, GEORGE P. JENKINS, CHARLES B. McCOY, ALBERT M. REED, C. WILLIAM RITTERHOFF, RICHARD M. SMITH, C. THOMPSON STOTT, FREDERIC W. WEST, JR., and JOSEPH S. WRIGHT, all being directors of BETHLEHEM STEEL CORPORATION,

and

BETHLEHEM STEEL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CLETUS P. LYMAN
1612 Latimer Street
Philadelphia, Pennsylvania
Attorney for Petitioner

PRESS OF ALLEN, LANE & SCOTT, INC., PHILADELPHIA

INDEX

	PAGE
OPINION AND JUDGMENTS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES AND RULES INVOLVED	4

TABLE OF AUTHORITIES

Cases Cited:

Ash v. Baker, 392 F.Supp. 368 (E. D. Pa. 1975) 2

Ash v. LFE Corp., No. 75-1217 (Third Circuit Opinion filed November 3, 1975) 10

Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 324 (1936) 4, 13

Beatty v. Bright, 318 F.Supp. 169 (S. D. Iowa 1970) 11

Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1301-1302 (2d Cir. 1973) 10

Kohn v. American Metal Climax, Inc., 458 F.2d 255, 269 (3rd Cir. 1972) 10

Mills v. Electric Auto-Lite Co., 396 U. S. (1970) 375, 378, 384 ..... 10, 12

Northway, Inc. v. TSC Industries, Inc., 512 F.2d 324, 330 (7th Cir. 1975) 10

Rafal v. Geneen, 1972-73 Transfer Binder, CCH Fed. Sec. L. Rep. ¶93,505 (E. D. Pa. 1972) 11

Robinson v. Penn Central Co., 336 F.Supp. 655 (E. D. Pa. 1971) 11

Ronson Corp. v. Liquifin Aktiengesellschaft, 483 F.2d 846, 851 (3rd Cir. 1973) 10

TABLE OF AUTHORITIES (Continued)

Page

Siebert v. Abbott, 1972-73 Transfer Binder, CCH Fed. Sec. L. Rep. ¶93,939 (E. D. Pa. 1973) 11

Smallwood v. Pearl Brewing Company, 489 F.2d 579, 603-4 (5th Cir. 1975), cert. den. 419 U. S. 873 (1974) 10

Sonesta Int'l Hotels, Inc. v. Wellington Associates, 483 F.2d 247, 251 (2nd Cir. 1973) 10, 12

Twentieth Century Fox Film Corp. v. Lewis, 334 F.Supp. 1398, 1402 (S. D. N. Y. 1971) 13

Wall Street Journal, April 8, 1975, "Firms that Gave Illegal Campaign Gifts" 11

Constitutional and Statutory Provisions:

Securities Exchange Act of 1934

Section 14(a)

15 U. S. C. § 78n(a) 4

SEC Rule 14a-9

17 C. F. R. 240, 14a-9 ..... 4, 7, 10

Securities Act Release No. 5466, Dated March 8, 1974, 1973-74 Transfer Binder, CCH Fed. Sec. L. Rep., ¶79,699 11

15 U. S. C. § 78aa 5

28 U. S. C. § 1254(1) 2

IN THE

Supreme Court of the United States

No.

RICHARD A. ASH, on behalf of himself and on behalf of BETHLEHEM STEEL CORPORATION,

Petitioner

v.

CROWDUS BAKER, BERNARD D. BROEKER, STEWART S. CORT, LEWIS W. FOY, CHARLES W. GANZEL, THOMAS S. GATES, GEORGE P. JENKINS, CHARLES B. McCOY, ALBERT M. REED, C. WILLIAM RITTERHOFF, RICHARD M. SMITH, C. THOMPSON STOTT, FREDERIC W. WEST, JR., and JOSEPH S. WRIGHT, all being directors of BETHLEHEM STEEL CORPORATION,

and

BETHLEHEM STEEL CORPORATION

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Richard A. Ash prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Third Circuit rendered in these proceedings on February 13, 1976.

OPINION AND JUDGMENTS BELOW

The United States District Court for the Eastern District of Pennsylvania granted judgment against Petitioner on April 21, 1975, with opinion. On April 22, 1975, the District Court amended its opinion. The order granting judgment and memorandum, as amended, are printed as Appendix D hereto, *infra,* p. A4-A14. The opinion, as amended is reported at 392 F. Supp. 368 (E.D.Pa. 1975). On February 13, 1976, the Court of Appeals for the Third Circuit affirmed the judgment of the District Court, without opinion. The judgment order of the Court of Appeals is printed as Appendix C hereto, *infra,* p. A3. On March 8, 1976, the Court of Appeals denied a Petition for Rehearing, without opinion. The Order denying rehearing is printed as Appendix B hereto, *infra,* p. A2.

JURISDICTION

The Court of Appeals entered judgment affirming the District Court on February 13, 1976. A timely Petition for Rehearing was filed by Petitioner on February 27, 1976, and was denied by Order (Appendix B, p. A2) of the Court of Appeals on March 8, 1976. On March 15, 1976, Petitioner filed a Motion for Stay of Mandate pending application to this Court for a Writ of Certiorari, which the Court of Appeals granted by Order of March 19, 1976. The Order Staying Mandate is printed as Appendix A hereto, *infra,* p. A1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), granting jurisdiction to this Court to review any civil case in Courts of Appeals by writ of certiorari.

BLEED THROUGH

QUESTIONS PRESENTED

1. Did the lower courts err in not deciding which standard should be used to determine the facts that must be included in proxy solicitations as *material* within the meaning of SEC Rule 14a-9, 17 C.F.R. 240.14a-9?

2. Did the lower courts err in deciding that the substance and status of litigation alleging unlawful political expenditures by corporate directors need not be disclosed to stockholders in connection with a management proxy solicitation seeking:

(a) re-election by the stockholders of eight directors accused of making unlawful expenditures;

(b) votes in favor of reservation of stock, having a market value of $63,250,000, for a new stock option plan, the terms of which provided for award of purchase options to employees at the discretion of the directors;

(c) votes in favor of an amendment to the certificate of incorporation so as to grant discretionary power to the directors to apportion incentive compensation among executives, where previously division was in accordance with a stated formula;

(d) votes against two stockholder proposals to require additional reports by management to all stockholders?

3. Did the lower courts err in not deciding that the proxy solicitation should have disclosed that the directors were using corporate funds to defend themselves, that they had spent at least $75,000, and that they were seeking at corporate expense to have legal prohibitions on the expenditure of corporate and union funds for political candidates declared unconstitutional?

4. Did the district court err in stating that plaintiff-stockholder was "guilty of laches and bad faith" because he did not commence his action for injunctive relief prior to preparation and distribution of the challenged proxy solicitation? And did the Court of Appeals err in not correcting this statement, contrary to this Court's holding that "'assumed potential invasions' of rights are not enough to warrant judicial intervention?" *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 324 (1936).

STATUTES AND RULES INVOLVED

Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), and SEC Rule 14a-9, 17 C.F.R. 240.14a-9, promulgated thereunder. The Section and Rule are printed as Appendix E hereto, p. A15.

BLEED THROUGH

STATEMENT OF THE CASE

1. Jurisdiction of the District Court

Jurisdiction of the District Court was based on Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, granting jurisdiction over violations of the Act or rules, regulations or orders thereunder to district courts of the United States.

2. Background

On September 28, 1972, Petitioner filed an action in the United States District Court for the Eastern District of Pennsylvania, *Ash* v. *Cort*, Civil Action No. 72-1925. Petitioner alleged that the directors of the Bethlehem Steel Corporation ("Bethlehem") had caused an unlawful expenditure by Bethlehem in connection with the 1972 Presidential Election campaign of corporate funds and other resources with a total value in excess of $500,000. That action ultimately came before this Court, *sub nom Cort* v. *Ash*, No. 73-1908, and a Writ of Certiorari was granted to the United States Court of Appeals for the Third Circuit. On June 17, 1975, this Court decided, at 422 U.S. 66, that Petitioner was not entitled to maintain his action by implication under the federal criminal statute prohibiting corporate and union political expenditures, Title 18 U.S.C. § 610, because injunctive relief was not available to him under this statute in light of the 1974 Federal Election Campaign Act Amendments and because implication of a federal right of damages on behalf of a corporation under § 610 would intrude into an area traditionally committed to state law without aiding the main purpose of § 610. The Court observed that the use of corporate funds in violation of federal law may give rise to a cause of action for *ultra vires* and for breach of fiduciary duty, and committed respondent to state-provided remedies. 422 U.S. at 84-5.

On August 7, 1975, Petitioner filed an action in the Court of Chancery of the State of Delaware, in and for New Castle County, *Ash* v. *Cort,* Civil Action No. 4851, and alleged that the directors of Bethlehem adopted a policy for Bethlehem in 1971 or 1972, involving the utilization of Bethlehem resources, including the expenditure of funds, to influence the 1972 election. The expenditures were alleged to be *ultra vires,* a waste of corporate assets, and a breach of the directors' fiduciary duty to Bethlehem.

3. The Complaint

The Complaint in the instant case alleged that management of Bethlehem caused to be mailed a proxy solicitation bearing the date "February 28, 1975," in connection with its annual stockholders meeting held on April 29, 1975. The proxy solicitation omitted statements about *Ash* v. *Cort* in connection with a request to vote in favor of a management slate of directors and for or against several proposals. Petitioner asserted that the allegations against directors and the way in which directors had defended *Ash* v. *Cort* were material to matters raised in the proxy solicitation.

4. Course of the Proceedings

Plaintiff received a copy of the proxy solicitation during March, 1975, and on March 27, 1975, he filed a complaint seeking to have proxies solicited by the material declared null and void, to enjoin the holding of the annual meeting of Bethlehem, and to have damages awarded in favor of Bethlehem and against management for added costs consequential to the unlawful solicitation. Plaintiff moved for a preliminary injunction on March 31, 1975, and the District Court fixed a hearing date of April 17, 1975.

A hearing was held as scheduled on April 17, 1975. Evidence was presented, including a stipulation of facts and a number of documentary exhibits. At the conclusion of the hearing, the parties agreed that the hearing should be deemed final with respect to injunctive relief, and, if an injunction were denied for failure to prove a violation of SEC Rule 14a-9, the entire case should be finally decided. But, if a violation were found and an injunction were granted, the case should proceed to the issue of damages.

On April 22, 1975, the District Court filed a memorandum and order (Appendix D, p. A4-A14), holding that Petitioner had failed to establish a violation of SEC Rule 14a-9, and denying injunctive relief and dismissing the Complaint. The District Court stated that Petitioner was guilty of laches and bad faith in not bringing suit prior to the proxy solicitation.

Petitioner filed a timely notice of appeal. After oral argument, the Court of Appeals entered a judgment order (Appendix C, p. A3), affirming the judgment of the District Court "for the reasons set forth in the District Court opinion." Petitioner's petition for rehearing in the Court of Appeals was filed February 27, 1976, and denied on March 8, 1976 (Appendix B, p. A2).

5. Statement of Facts Material to Consideration of the Questions Presented

The District Court heard this case after the Writ of Certiorari had been granted in *Cort* v. *Ash*, but prior to this Court's decision and prior to the commencement of *Ash* v. *Cort* in Delaware State Court. When this case was in the District Court, *Ash* v. *Cort* had been pending in the federal courts for two and one-half years. It had not been tried in the District Court, but some of the factual allegations had been admitted by the directors of Bethlehem,

including the expenditure of funds for allegedly partisan advertising designed to influence the 1972 election.

The defense of *Ash* v. *Cort* has been paid for by Bethlehem. The amount spent through April 17, 1975, exceeded $75,000. The defenses have included that restraints on partisan political spending by directors from corporate treasuries and by union officials from union treasuries are unconstitutional. Bethlehem directors have used corporate funds to argue that the federal statute prohibiting such expenditures, 18 U.S.C. § 610, "is the paradigm of the Constitutionally overbroad statute," that it cripples expression and frustrates the goal of the First Amendment, that it constitutes abolition of First Amendment rights, and that it strikes "at the very heart of protected expression." The directors' position was stated in their brief in this Court in *Cort* v. *Ash* at page 74:

> "There is no characteristic either of the corporate form of organization or of labor unions which makes § 610's prohibition peculiarly appropriate as applied to them and not to other organizations. No interest justifies its selective restriction of the right of participation in governmental processes. This discriminatory provision, the very object of which is selectively to silence and sterilize politically two important segments of the community, cannot be reconciled with the guarantee of equal protection of the laws and has no place in an open society." Petitioner's Brief, *Cort* v. *Ash*, p. 74.

The proxy solicitation sought the execution of proxy forms to vote to elect 14 directors, all of whom had permitted the use of corporate funds to defend *Ash* v. *Cort*, and eight of whom had been defendants therein. The solicitation also sought votes in favor of reservation of stock, having a market value of $63,250,000 for a new stock option plan, the terms of which provided for award

BLEED THROUGH

of purchase options to employees at the discretion of the directors; votes in favor of an amendment to the certificate of incorporation so as to grant discretionary power to the directors to apportion incentive compensation among executives, where previously division was in accordance with a stated formula; and, votes against two stockholder proposals to require additional reports by management to all stockholders.

One of the reports proposed by stockholders would have required the board of directors to issue a full written report, four months after the annual meeting, to stockholders on the corporation's strip mining activities in Appalachia. In seeking votes against the proposal, the management proxy solicitation said:

> "The preparation, printing and mailing of the report requested in the resolution quoted above would require Bethlehem to expend substantial amounts of time and money. The policy of Bethlehem is, of course, to comply fully with all the laws applicable to its operations, including its mining operations."

The proxy solicitation made no reference to *Ash* v. *Cort*. The solicitation did, however, state details of an indictment charging one of the nominees for director with participating in a conspiracy and scheme to defraud Bethlehem and a contractor in connection with the construction of a steel plant.

Neither the annual report to stockholders, nor the annual report to the Securities and Exchange Commission, referred to *Ash* v. *Cort*. No filings with the SEC have ever disclosed the existence of *Ash* v. *Cort*.

Ash v. *Cort* is still pending in the Delaware Court of Chancery and is in the pretrial phase. Defendants have filed a motion to dismiss for failure to state a claim upon which Petitioner would be entitled to any relief and because of an alleged bar by *res judicata*, a statute of limitations and laches.

REASONS FOR GRANTING THE WRIT

I. *This case raises important questions of federal law which should be settled by this Court.*

A threshold question presented to and considered by, but not decided by the courts below is: Which standard should be used to determine the facts that must be included in proxy solicitations as *material* within the meaning of SEC Rule 14a-9, 17 C.F.R. 240.14a-9?

As noted by the District Court, 392 F.Supp. at 371, two standards have been adopted by Courts of Appeals. One requires inclusion of facts which would have "a significant propensity to affect the voting process." The other, less strict, standard requires inclusion of facts which "might have been considered important by a reasonable shareholder who was in the process of deciding how to vote." Both standards are derived from language in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 384 (1970).

The apparent existence of two different standards has given rise to different law among the Circuits. See discussion in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281 1302 (2d Cir. 1973). The "might" standard was adopted in *Northway, Inc.* v. *TSC Industries, Inc.* 512 F.2d 324, 330 (7th Cir. 1975); *Ronson Corp.* v. *Liquifin Aktiengesellschaft*, 483 F.2d 846, 851 (3rd Cir. 1973), and *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 269 (3rd Cir. 1972). But see, *Ash* v. *LFE Corp.*, No. 75-1217 (Third Circuit Opinion Filed November 3, 1975).

Opinions which seem to have adopted the "would" standard include *Smallwood* v. *Pearl Brewing Company*, 489 F.2d 579, 603-4 (5th Cir. 1975), *cert. den.* 419 U.S. 873 (1974), and *Gerstle* v. *Gamble-Skogmo, Inc., supra*, at 1301-2. But see, *Sonesta Int'l. Hotels, Inc.* v. *Wellington Associates*, 483 F.2d 247, 251 (2d Cir. 1973).

BLEED THROUGH

A question of this importance which gives rise to uncertainties not only from Circuit to Circuit but from one decision to another within the Circuits should be decided by this Court.

The question of disclosure of allegations against directors in proxy material has arisen repeatedly in District Courts. Among such cases are *Rafal* v. *Geneen,* 1972-73 Transfer Binder, CCH Fed. Sec. L. Rep. ¶93,505 (E.D.Pa. 1972); *Robinson* v. *Penn Central Co.,* 336 F.Supp. 655 (E.D.Pa. 1971); and *Beatty* v. *Bright,* 318 F.Supp. 169 (S.D.Iowa 1970). The question of disclosure of other significant corporate litigation has arisen in *Siebert* v. *Abbott,* 1972-73 Transfer Binder, CCH Fed. Sec. L. Rep. ¶93,939 (E.D.Pa. 1973).

The case involves disclosure of litigation of paramount significance to stockholders. Frequent press reports state that stockholders are filing action to recover unlawful political expenditures and putting forward shareholder proposals to provide safeguards against such expenditures. See, *Wall Street Journal,* April 8, 1975, "Firms that Gave Illegal Campaign Gifts." Corporations are not only subject to criminal prosecution for political expenditures but they may be investigated and prosecuted for related violations, such as tax fraud and breach of rules of agencies that regulate particular lines of commerce. In a 1974 Release, the Securities and Exchange Commission noted that it has "received a number of inquiries from issuers, stockholders, and other persons" related to the problem of disclosure of criminal charges against and convictions of officers and directors arising out of allegedly unlawful campaign contributions. Securities Act Release No. 5466, dated March 8, 1974, 1973-74 Transfer Binder, CCH Fed. Sec. L. Rep., ¶79,699.

The question of disclosure of corporate litigation in proxy materials, particularly litigation involving allega-

tions of unlawful political contributions, should be decided by this Court.

II. *The lower courts ignored the decision of this Court in Mills* v. *Electric Auto-Lite Co. as to the materiality of conflicts of interest of directors in proxy solicitations and apparently decided the issue contrary to the Second Circuit.*

The lower courts without comment passed over the significance of the conflict in interest of management in seeking to remain in office when they were in the process of using corporate funds to defend themselves against allegations of invading the corporate treasury. Among the defenses being pursued in *Ash* v. *Cort,* including in this Court, is that Title 18 U.S.C. § 610 is *per se* unlawful. Such a defense, if ultimately sustained, would radically alter the character of stockholder-management relations. Moreover, it would enhance the political power of union leadership, a matter of considerable importance to stockholders of a steel manufacturing company.

This Court has found conflicts of interest material and the kind of information that must be disclosed in proxy solicitations as a matter of law. *Mills* v. *Electric Auto-Lite Co., supra,* at 378. In *Sonesta* v. *Wellington, supra,* 483 F.2d at 251, the Second Circuit called omission of disclosure of a conflict of interest "the most persuasive claim" of plaintiffs.

III. *The lower courts ignored the decision of this Court in Ashwander* v. *Tennessee Valley Authority in stating, in the case of the District Court, that Petitioner was "guilty of laches and bad faith" because he waited until the proxy solicitation material was prepared and distributed to bring an action for injunctive relief, and,*

BLEED THROUGH

in the case of the Court of Appeals, in not correcting the statement.

The District Court announced an unprecedented principle that action to prevent injury as a result of misleading documents regulated by the Securities Exchange Act of 1934, should be brought to the attention of the federal courts prior to the preparation and distribution of such documents. The Court of Appeals failed to correct this statement.

Such a principle flies in the face of this Court's holding in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 324 (1936), that claims based on assumed potential invasions of rights are not enough to warrant judicial intervention.

The principle stated by the District Court would seem to authorize the bringing of actions for injunctions by stockholders (or, for that matter, prospective purchasers of stock) to mandate inclusion of facts in documents prior to their preparation. The District Court's principle would not even seem to require that the stockholder or other plaintiff ascertain whether the issuer planned to include the fact without the necessity of a mandatory injunction.

The correct result was reached in *Twentieth Century Fox Film Corp.* v. *Lewis*, 334 F. Supp. 1398, 1402 (S.D.N.Y. 1971), where the court held that to rule on the adequacy of disclosure in an unwritten securities document would be speculative, and, therefore, any such request must be barred as premature.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Certiorari should be granted to review the judgment of the Court of Appeals.

Respectfully submitted,

CLETUS P. LYMAN
1612 Latimer Street
Philadelphia 19103

Attorney for Petitioner

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1765

RICHARD A. ASH, etc.,
Appellant

v.

CROWDUS BAKER, et al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until April 14, 1976.

ALDISERT

Circuit Judge

Dated: March 19, 1976

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1765

RICHARD A. ASH, ON BEHALF OF HIMSELF AND ON BEHALF OF BETHLEHEM STEEL CORPORATION,
Appellant,

v.

CROWDUS BAKER, BERNARD D. BROEKER, STEWART S. CORT, LEWIS W. FOY, CHARLES W. GANZEL, THOMAS S. GATES, GEORGE P. JENKINS, CHARLES B. McCOY, ALBERT M. REED, C. WILLIAM RITTERHOFF, RICHARD M. SMITH, C. THOMPSON STOTT, FREDERIC W. WEST, JR., and JOSEPH S. WRIGHT, ALL BEING DIRECTORS OF BETHLEHEM STEEL CORPORATION.

Present: ALDISERT, GIBBONS and ROSENN, *Circuit Judges.*

ORDER

Upon consideration of appellant's petition for rehearing before the original panel, it is ORDERED that said petition be and the same is hereby denied.

BY THE COURT,

ALDISERT
Circuit Judge

DATED: March 8, 1976

BLEED THROUGH

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1765

RICHARD A. ASH, ON BEHALF OF HIMSELF AND ON BEHALF OF BETHLEHEM STEEL CORPORATION,

Appellant,

v.

CROWDUS BAKER, BERNARD D. BROEKER, STEWART S. CORT, LEWIS W. FOY, CHARLES W. GANZEL, THOMAS S. GATES, GEORGE P. JENKINS, CHARLES B. McCOY, ALBERT M. REED, C. WILLIAM RITTERHOFF, RICHARD M. SMITH, C. THOMPSON STOTT, FREDERIC W. WEST, JR., AND JOSEPH S. WRIGHT, ALL BEING DIRECTOR OF BETHLEHEM STEEL CORPORATION.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 75-903)

Argued February 12, 1976

Before: ALDISERT, GIBBONS and ROSENN, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinion by The Honorable Edward N. Cahn, 392 F. Supp. 368 (E.D. Pa. 1975), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

ALDISERT
Circuit Judge

Attest:
Thomas F. Quinn, Clerk
DATED: February 13, 1976

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 75-903

RICHARD A. ASH, ON BEHALF OF HIMSELF AND ON BEHALF OF BETHLEHEM STEEL CORPORATION

v.

CROWDUS BAKER, et al.

and

BETHLEHEM STEEL CORPORATION

MEMORANDUM AND ORDER

CAHN, J. As Amended, April 22, 1975

Plaintiff, Richard A. Ash, in a derivative action filed March 27, 1975, seeks to enjoin the holding of the annual meeting of Bethlehem Steel Corporation (Bethlehem) scheduled for April 29, 1975. The individual defendants are the directors of Bethlehem. Bethlehem, itself, is designated as a nominal defendant.

The basis of plaintiff's contention is that the proxy solicitation material distributed to Bethlehem's shareholders was materially misleading and in violation of the Securities Exchange Act of 1934[1] and Regulation 14A and

[1] 15 U.S.C. 78a et seq.

BLEED THROUGH

Rule 14a-9 thereunder. Specifically, plaintiff claims that the proxy solicitation material fails to disclose the existence, substance and present status of certain prior litigation brought by Ash, the same plaintiff in this case, against Bethlehem and its officers and directors.

The prior litigation resulted in a denial of a preliminary injunction,[2] affirmation of said denial on appeal,[3] grant of a motion for summary judgment in favor of Bethlehem and its officers and directors, reversal of summary judgment on appeal,[4] and grant of certiorari by the Supreme Court.[5] Argument was held before the Supreme Court on March 18, 1975. The matter is now *sub judice* in the Supreme Court. In the prior litigation, Ash contends that the officers and directors of Bethlehem used corporate funds for political advertising[6] in the 1972 Presidential Campaign and otherwise expended corporate funds in violation of the Federal Corrupt Practices Act, 18 U.S.C. 610. In the prior litigation, Ash, in addition to other relief, seeks damages of $500,000 on behalf of Bethlehem against the individual defendants.

In the case at bar, Ash contends that the existence, substance and present status of this prior litigation should have been disclosed to the shareholders in the proxy solicitation material. Plaintiff, in addition to his claim that an injunction should issue to restrain the holding of Bethlehem's annual meeting, contends that all proxies obtained for said meeting be nullified and an award of money damages be entered against the individual defendants for costs incurred in rescheduling the annual meeting plus an award of counsel fees and costs to his attorney.

---

[2] 350 F.Supp. 227 (E.D. Pa. 1972)

[3] 471 F.2d 811 (3rd Cir. 1973)

[4] 496 F.2d 416 (3rd Cir. 1974)

[5] 42 L.Ed 2d 264 (1974)

[6] A reproduction of the advertisement can be found at 350 F.Supp. 233.

Appendix D

A motion for a preliminary injunction was filed on March 31, 1975, by the plaintiff. Thereafter, a pre-trial conference was held on April 4, 1975, and a full hearing was held on April 17, 1975. At the hearing, counsel for the corporation defendant and the individual defendants contended that this Court lacked in personam jurisdiction over those individual defendants who were not personally served. However, it was stipulated between counsel that the hearing on the injunction would proceed as a trial on the merits in accordance with F.R. Civ.P. 65(a)(2). If the injunction is denied, it is to be deemed a final order. If it is granted, the question of damages is to be heard subsequently and after personal service is made on all of the individual defendants.

The Court, after considering the verified complaint, a written stipulation of facts and certain documentary evidence produced at the hearing, and having heard oral argument, makes the following findings of fact:

FINDINGS OF FACT

1. Plaintiff is an individual residing in Philadelphia, Pennsylvania.

2. Bethlehem Steel Corporation (Bethlehem) is a Delaware corporation with a principal office located at Bethlehem, Pennsylvania.

3. Bethlehem is the second largest steel producer in the United States, with 1974 net sales of about $5,381,000,000. It maintains a number of plants and offices for the conduct of its business at various locations throughout the United States.

4. Defendants, Crowdus Baker, Bernard D. Broeker, Stewart S. Cort, Lewis W. Foy, Charles W. Ganzel, Thomas S. Gates, George P. Jenkins, Charles B. McCoy,

BLEED THROUGH

Albert M. Reed, C. William Ritterhoff, Richard M. Smith, C. Thompson Stott, Frederic W. West, Jr., and Joseph S. Wright are individuals residing in the United States who comprise the Board of Directors of Bethlehem. Foy is Chairman, West is President, Smith and Ritterhoff are Executive Vice Presidents, Stott and Ganzel are Senior Vice Presidents, and Reed is Vice President and Comptroller.

5. Bethlehem Common Stock is listed and traded on the New York Stock Exchange. On January 31, 1974, 43,665,676 shares of Bethlehem Common Stock were outstanding and in the hands of the public. On December 31, 1974, there were about 188,000 stockholders of record of Bethlehem Common Stock.

6. The only stock entitled to be voted at the Annual Meeting of Bethlehem are shares of Bethlehem Common Stock.

7. The Annual Meeting of Bethlehem (the "Annual Meeting") will be held on April 29, 1975, at 11:00 a.m. in the Hotel duPont, Eleventh and Market Streets, Wilmington, Delaware, for certain purposes including the election of Directors.

8. Plaintiff has made no demand on the directors of Bethlehem to seek redress for Bethlehem directly for the matter out of which plaintiff's suit is alleged to arise.

9. Plaintiff has made no request for concerted action to plaintiff's fellow stockholders.

10. In connection with the Annual Meeting, there was prepared and distributed by United States mail to the stockholders of Bethlehem a Notice of Annual Meeting of Stockholders and Proxy Statement, along with two forms of Proxy. Copies of these proxy solicitation documents have been received into evidence.

11. The Proxy Statement solicited the recipient stockholder *inter alia,* to vote for the election of the individual defendants as directors through the signing and returning of the Form of Proxy.

12. The expenses incurred by Bethlehem to date, related to the defense of the case of *Richard A. Ash* v. *Stewart S. Cort, et al.,* Civil Action No. 72-1925 (E.D. Pa. Complaint filed September 27, 1972) (*"Ash* v. *Cort"*), exceed $75,000.

13. From September 27, 1972, to date:

(a) The proxy material and annual reports published by Bethlehem have not mentioned *Ash* v. *Cort.*

(b) Filings by Bethlehem with the Securities & Exchange Commission have not referred to *Ash* v. *Cort.*

(c) No written communications between Bethlehem and the Securities & Exchange Commission have referred to *Ash* v. *Cort.*

(d) No resolutions of the board of directors or minutes of the board of directors have referred to *Ash* v. *Cort.*

(e) No resolutions of the board of directors have referred to the decision to raise the question of whether Title 18 U.S.C. 610 is unconstitutional.

14. The estimated costs of reprinting the proxy material and resoliciting Bethlehem stockholders are $92,500, comprised of the following estimated expenses:

(1) Reprinting proxy statement	$12,000
(2) Reprinting proxy card	3,000
(3) Envelopes, outgoing and return	3,000
(4) Computer printing of proxy cards—overtime basis	3,000

BLEED THROUGH

(5) Part time help for inserting material in outgoing mail envelopes	$ 2,500
(6) Outgoing postage	20,000
(7) Return postage	16,000
(8) Delivery of proxy material to brokers	3,000
(9) Broker solicitation fees and postage ..	30,000
	$92,500

14A. Resolicitation of Bethlehem stockholders and the postponement of the Annual Meeting to a subsequent date would result in incurring other additional costs and expenses, the full nature and amount of which cannot be presently accurately estimated.

15. Plaintiff's attorney, Cletus P. Lyman, Esquire, wrote letters dated March 27, 1973, and April 4, 1973, on behalf of plaintiff to Bethlehem. Francis Van Nuys, Esquire, Vice President Law and General Counsel, wrote letters dated April 3, 1973, and April 10, 1973, to Cletus P. Lyman, Esquire, in response thereto. All four letters have been admitted into evidence.

16. Except as stated in paragraph 15 hereof, plaintiff has sent no other communication to Bethlehem or its directors in 1972, 1973, 1974 or 1975.

17. Plaintiff personally attended Bethlehem's Annual Meeting in 1974 and did not raise any question concerning *Ash* v. *Cort* or the proxy material.

18. Plaintiff, Ash, as of February 28, 1975, owns 50 shares of Bethlehem's stock and is entitled to vote at the April 29, 1975, Annual Meeting of the Shareholders of Bethlehem.

DISCUSSION

The first question to resolve is whether the omission of the substance and present status of the prior litigation

from the proxy solicitation material is in violation of Rule 14a-9. This rule provides as follows:

> "240.14a-9. *False or misleading statements.*
>
> "(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.
>
> "(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made. (17 C.F.R. § 240.14a-9)

The plaintiff does not allege that a false statement was made nor that there is an omission to correct a statement in an earlier proxy solicitation that has become false and misleading. The plaintiff claims that the Rule is violated because the proxy solicitation documents fail to state material facts necessary to make the statements contained therein not false or misleading.

A review of the precedent on the test to determine the materiality of facts omitted from proxy statements

BLEED THROUGH

reveals two possible approaches. The stricter approach requires inclusion of facts which would have "a significant propensity to affect the voting process." *Mills* v. *Electric Auto-lite Co.*, 396 U.S. 375, 384 (1960). Chief Judge Friendly has approved the stricter approach in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2nd Cir. 1973). The less strict approach is also derived from language in *Mills* v. *Electric Auto-lite Co., supra,* and has been formulated by Judge Swygert in *Northway Inc.*, v. *TSC Industries, Inc.*, ___ F.2d ___ (7th Cir. 1975).

> "We believe the policies which underlie Section 14(a) and Rule 14a-9 are best served by a test that includes all facts which a reasonable stockholder might consider important. We are mindful of Judge Friendly's thorough consideration of this question and of the criticism that such a test is 'too suggestive of a mere possibility, however unlikely.' *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1302 (2nd Cir. 1973). Yet we think any test which does not require the inclusion of facts which *could* influence a reasonable stockholder would seriously undercut the intended prophylactic effect of these disclosure provisions. Any speculation under such a test is limited by the 'reasonable stockholder' language therein and by the overriding purposes of Section 14(a), from which any test must take its meaning and to which Justice Harlan specifically referred in *Mills*. This test will not reach 'trivial' and 'unrelated' facts; neither will it fail to reach facts which may be relevant for some, but not for others." (Emphasis in original)

Under either test I am of the opinion that the omission from the proxy solicitation documents of the substance and present status of the prior litigation is not material. In the first place, there is now pending before

the Supreme Court certain complex and difficult legal issues. The materiality of this prior litigation to the proxy statement depends, at least to a certain extent, on the outcome of the Supreme Court case. In the second place, those cases which have found an omission of a material fact to exist in a proxy statement involve omissions of facts which are definitely significant to the shareholders and not the omission of matters which might not be significant. For example, proxy solicitation documents must include financial information relevant to a merger[7] or acquisition,[8] insider trading[9] or major refinancing.[10] Such omissions are obviously material matters which should be disclosed to shareholders. It may well be that after the Supreme Court issues its opinion in the pending litigation, the substance of that litigation will become material in regard to future proxy solicitations by Bethlehem. I find that in light of the above findings of facts and the pending litigation in the Supreme Court, the omission in the proxy solicitation documents for the 1975 annual shareholders meeting of Bethlehem is immaterial under either the "significant propensity" test or the test of whether the omission might have influenced a reasonable shareholder. It should be stated however, that this finding is limited to the precise facts of the within case.

Since I have found that the omissions are not material, I do not need to resolve the question of whether the extraordinary equitable remedy of injunctive relief should be imposed. However, I note that the plaintiff in 1973 requested Bethlehem's management to refer to the prior litigation in its proxy statements. Thereafter, summary judgment was entered for the defendants on July

---

[7] *Beatty* v. *Bright*, 318 F.Supp. 169 (S.D. Iowa 1970)

[8] *Northway, Inc.* v. *TSC Industries, Inc.*, ___ F.2d ___ (7th Cir. 1973)

[9] *Rafal* v. *Geneen* [1972-1973 Transfer Binder CCH FED SEC L. REP ¶ 93505 (E.D. Pa. 1972)]

[10] *Robinson* v. *Penn Central Company*, 336 F.Supp. 655 (E.D. Pa. 1971)

BLEED THROUGH

11, 1973, which was not reversed until April 16, 1974. Following that reversal, plaintiff never again requested the inclusion of information pertaining to the prior litigation, although he attended the stockholders meeting in late April, 1974, until he brought suit in the within action on March 27, 1975. Equitable relief is not extended to a plaintiff who is guilty of bad faith.

> "As a matter of public policy, equitable relief typically will not be granted to an individual who has acted in bad faith with respect to the transaction that has been brought before the court." Wright & Miller, Federal Practice and Procedure, Civil § 2946.

Plaintiff is guilty of laches and bad faith in bringing this matter to the attention of the Court after the proxy solicitation materials have been sent to the shareholders. The substantial expense to Bethlehem of approximately $92,500 to resolicit proxies would be too great in relation to any possible benefit to the shareholders in disclosing the substance of the prior litigation.

CONCLUSIONS OF LAW

1. The Court has subject-matter jurisdiction pursuant to 28 U.S.C. 1331 and 15 U.S.C. 78 aa.

2. The Court has in personam jurisdiction over Bethlehem Steel Corporation. Counsel for the individual defendants has consented to in personam jurisdiction over said defendants for the purpose of determining whether a permanent injunction shall issue.

3. Plaintiff has failed to establish that the 1975 proxy solicitation documents of Bethlehem Steel Corporation omit material facts in violation of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a), and the regulations and rules promulgated thereunder.

4. Injunctive relief will be denied.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 75-903

RICHARD A. ASH, On Behalf of Himself and on Behalf of BETHLEHEM STEEL CORPORATION

v.

Crowdus Baker, et al.

and

BETHLEHEM STEEL CORPORATION

ORDER

And Now, this 21st day of April, 1975, following a full hearing and oral argument, plaintiff's complaint is dismissed and injunctive relief is denied.

BY THE COURT:

Edward N. Cahn, *J*

BLEED THROUGH

APPENDIX E.

Section 14(a), Securities Exchange Act of 1934, 15 U.S.C. §78n.

Sec. 14. (a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

Rule 14a-9, Securities and Exchange Commission, 17 C.F.R. 240.14a-9.

Rule 14a-9. False or Misleading Statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or

not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

BLEED THROUGH